STATE OF SOUTH CAROLINA	)	BEFORE THE ADMINISTRATOR
	)	SOUTH CAROLINA DEPARTMENT
COUNTY OF RICHLAND	)	OF CONSUMER AFFAIRS

South Carolina Department of Consumer Affairs,	)	
Petitioner,	)	
	)	DOCKET NO. 0216
vs.	)	
	)	**ORDER**
Roy Cook, Individually and American Mortgage of Columbia	)	
Respondents.	)	

STATEMENT OF THE CASE

This matter comes before me pursuant to service of the Notice of Hearing and Petition on or about June 17, 2002 (Exhibit 1). The Notice and Petition were accompanied by an affidavit of service indicating that copies thereof were served upon Roy Cook at his address on 1139 N. Firetower Road, Blythwood, SC, and doing business as American Mortgage of Columbia at its business address at 1925 Bull Street, Columbia, SC. Likewise included were return receipts indicating that delivery was received at the Columbia address by a Priscilla Dorch on June 20, 2002 and at the Blythwood address by Lisa King on June 18, 2002 (Exhibit 1).

Petitioner claims that Respondent Cook, individually and as sole owner of Respondent American Mortgage of Columbia ("AMC"), a licensed residential mortgage loan broker, has personally or through the actions of employees, committed a number of acts calling into question his fitness to operate as a mortgage loan broker. These acts include the filing of Supplemental Form A stating "no" to the question asking whether he had ever had a felony

conviction, when in fact he had convictions in 1977 and 1986. The Petitioner also alleges that Respondents actions or inactions on two consumer complaints, that of William and Leslie Niblock and Leon and Francis Johnson likewise violate the Mortgage Loan Broker Act. Petitioners also stated that the Respondents failed to provide the Johnsons required disclosures in violation of the Real Estate Settlement Procedures Act, the Truth in Lending Act,, the Consumer Protection Code's Attorney/Insurance Agent preference requirements, the Mortgage Loan Broker Act and an Assurance of Discontinuance signed in October of 1999. Finally, the Petitioner alleged that in September of 2001 Respondents requested that Sellers Michael Knox and Julie Rasmussen falsify a verification of rent or mortgage by falsely stating that a prospective buyer had a mortgage when he had actually been renting the property for approximately six months.

On or about July 30, 2002, Respondent Cook filed an Answer to the Petition admitting the first seven paragraphs of the Petition, indicating he had insufficient information to admit or deny paragraphs 8, dealing with the Department's authority to mediate complaints and the allegations of complainants Niblock and Johnson, and paragraph 9, alleging that Respondents had sought a verification indicating that Mr. Miller had a mortgage when he was actually renting. He demanded strict proof of paragraphs 8 and 9. He denied all other paragraphs of the Petition alleging various violations of the law.

A hearing was held on July 30, 2002. Petitioner was represented by attorney Danny Collins. Respondent Cook represented himself. Testimony was taken from William Niblock, Leon Johnson, Realtor Elizabeth Webber and Jane Shuler for the Petitioner. Roy Cook testified on behalf of himself.

The essence of Mr. Niblock's testimony was he and his wife had gone to AMC to

get a loan to acquire a home. He said he went to AMC's offices. He further testified that Patrick Cook, while an employee of AMC, had taken fifteen hundred ($1,500.00) dollars from the Niblocks as downpayment on a home, and that AMC had been unable to acquire a loan for him and that AMC had never refunded the money.

Elizabeth Webber testified that she represented Michael Knox and Julie Rasmussen in the attempted sale of their property on 1216 Valhalla Dr., Columbia. She testified that they were interested in selling their property to a Cory Miller, and got the prospective sellers and buyers to sign a dual agency consent. The sellers had entered into a lease agreement to allow Mr. Miller to live in the house(Exhibit 5). Mr. Miller was attempting to get a loan to purchase the home through AMC by loan officer Greg Floyd, an employee of AMC. Upon repeated inquiries from Ms. Webber to Mr. Floyd indicating her clients needed a firm commitment letter from a lender for a loan for Mr. Miller, Mr. Floyd sent her a conclusory letter saying the loan should close no later than December 14, 2001. He typed his name and identified himself as "Sr. Loan Officer" for American Mortgage, the broker, not a funding lender (Exhibit 6). Moreover, Mr. Floyd sent, with an AMC letterhead fax cover, a request for verification of rent or mortgage to the sellers requesting "pay off figures . . .to September 30, 2001," "pay off amount," and "per diem interest" for a mortgage ostensibly held on the home at 1216 Valhalla Drive. It also asked for other information such as the date the mortgage originated, the monthly principal and interest, whether the mortgage was assumable and the like (Exhibit 7). Ms. Webber testified she advised the sellers not to respond because the fax appeared to be soliciting a fraudulent assertion (*i.e.* that Mr. Miller owned the property subject to a mortgage rather than pursuant to a short term lease).

Mr. Johnson testified that he had been referred to Mr. Cook by a real estate agent

of Russell and Jeffcoat. The agent had recommended AMC to him because Respondent Cook was arranging a loan for the agent. Mr. Johnson was trying to acquire a home in the Hastings Point subdivision, and had been trying to arrange construction financing and a purchase of a lot in the subdivision for an amount of $39,000.00. The first meeting in whcih the Johnsons sought AMC's aid in arranging a loan for them occurred on or about February 11,2000.

He had paid $400.00 in earnest money to Russell and Jeffcoat to attempt to acquire the lot on or about February 14, 2000 (Exhibit 19), and the option was extended to May 15, 2000 (Exhibit 20) but it appears that the option period expired without the Johnsons purchasing the lot. Mr. Johnson testified that Mr. Cook helped arrange the construction loan with the Christy Company (aka "Twins. Inc."), even though for some reason, AMC was noot compensated *as a broker* for the loan. According to Mr. Johnson's testimony, when he went to close his loan Mr. Cook was not in attendance. Only later did he discover that he lot in question had been bought by Paramount Communications, a wholly owned Corporation owned by Respondent Roy Cook, had sold the lot to him at an inflated price of $69,000.00 (Exhibits 16 and 17). He further testified that, through the apparent cooperation of the closing attorney, a portion of the loan proceeds of the Johnson's construction loan with the Christie Company was used by Paramount to purchase the property in its name to resell the same day to the Johnsons at a substantial mark-up (Exhibits 21-23). Mrs. Frances Johnson, his wife also testified and verified that certain documents were not disclosed to them until the closing on June 30, 2000.

Respondent Roy Cook testified with regard to all of these allegations. With regard to the answers on the Supplemental Form As he claimed he knew the law to have a look back period of ten years (or only five with the first Supplement Form A in 1997) and had other written materials

from the Department that referenced the ten years, and so he read the question to be asking if he had any convictions within the look back period, even though the questions themselves state no time limitation. He also disavowed any knowledge of the transaction between Patrick Cook, his son, and the Niblocks, or the correspondence between Greg Floyd of his office and Ms. Webber and her clients. He suggested that since AMC was not in the real estate business, (a notion interestingly found not to be true with regard to the Johnsons), the Niblocks must have been seeking the services of a real estate broker and must have approached Patrick Cook in such a capacity. Neither Mr. Niblock, Mr. Cook or anything else in the record suggests that Patrick Cook held himself out as a real estate broker or anything other that as an employee of AMC. Moreover, Mr. Niblock testified that he went to Patrick Cook at AMC's place of business. Patrick Cook was unavailable because of his current incarceration.

With regard to the Valhalla Drive property, Mr. Cook testified that the faxes were sent with AMC letterhead fax covers, but that he did not know about the transaction and that the solicitation could not be considered a fraud because it was never forwarded to a funding lender or followed through on.

Respondent admitted that he bought and resold the Hastings Point lot to the Johnsons but insisted that it was merely an arms length business transaction and Mr. Johnson knew all about it. He also claimed that the proceeds from the inflated sales price were used in some unspecified part to pay the contractor to start purchase of materials and construction, and that Mr. Johnson for some reason would not have been able to commence construction otherwise. It is not clear from the testimony why money spent directly from Mr. Johnson's draw from the Christie loan was not feasible, while the use of proceeds from the sale of the lot to Respondent

Cook was. Respondent Cook was unable to produce any receipts or evidence that the proceeds from the sale had been used to pay the contractor, whom he said is now out of business, or that any portion of it had been used to purchase construction materials.

With regard to the allegation that Respondents had failed to make required disclosures, Respondent Cook insisted that all required disclosures had been provided to the Johnsons at closing, even though he did not contradict Mr. Johnson's allegation that Respondent Cook was not even at the closing to know whether the disclosures had been given. Moreover, Respondent was again unwilling or unable to produce copies of the disclosures so that the parties could see what they purported to say, whether or not they could be considered timely disclosed.

FINDINGS OF FACT

1.) Respondents were served with the Notice of Hearing and Petition in this matter on June 16, 2002 and received an additional copy of the Notice and Petition on June 20, 2002 at Respondent Cook's Bull Street address (Exhibit 1).

2.) Respondent AMC is a duly licensed residential mortgage loan broker and Petitioner Roy Cook is its owner (Testimony of Shuler; Exhibit 8).

3.) Patrick Cook is an employee of AMC (Testimony of Shuler; Exhibit 8). He is currently (or at least as of the date of the hearing was) incarcerated (Testimony of Respondent Cook and Mr. Niblock).

4.) Greg Floyd was likewise an employee of AMC as of September 2001, (Testimony of Shuler; Exhibits 7 and 8) .

5.) Respondent Cook, a/k/a Roy Neal Cooke, Jr., pled guilty to a count of falsification of Veterans Administration loan documents in violation of 18 *U.S.C.* 1001 *et seq.*,

and had an additional criminal conviction in 1986 (Exhibit 9; Testimony of Respondent Cook on cross examination).

6.) Respondent Cook's "no" response in 1996 to a Supplemental Form A question asking whether the applicant/employee had ever been convicted of a felony (Exhibit 8) is therefore not factually accurate.

7.) I find Mr. Niblock's testimony to be credible. When he went to AMC's place of business, he sought to buy a home. Having observed Mr. Niblock's testimony, it appears he lacked sophistication to distinguish the difference between a real estate "investment" transaction, as Respondent Cook suggested, and a broker's arranging for credit. The record is devoid of any evidence that the money accepted by Patrick Cook was for anything other than what Mr. Niblock stated, a downpayment on a home that AMC was to arrange, financed or otherwise. The record is devoid of any evidence that Patrick Cook held himself out to be a real estate broker, to the Niblocks or anyone else. Mr. Niblock's testimony establishes, however, that he went to AMC's place of business, and there dealt with Patrick Cook, apparently working within the scope of his employment.

8.) The Niblocks do not currently have a home loan, or the return of their money from AMC (Testimony of Niblock).

9.) Mr. Miller, the prospective purchaser for the property of Knox and Rasmussen, received no loan brokered through AMC, despite AMC's purported commitment letter, and later stayed in the premises until Mr. Knox and Ms. Rasmussen hired a lawyer to commence ejectment proceedings (Testimony of Webber; Exhibit 6).

10.) By an undated fax some time on or about September 30, 2001, Greg Floyd, a

loan officer for AMC, sent a fax requesting payoff figures from Mr. Knox and Ms. Rasmussen for a mortgage loan he knew did not exist (Testimony of Webber; Exhibit 7).

11.) In October 1999, Respondents entered into an Assurance of Discontinuance with the Staff in which the Staff had noted deficiencies in application documentation, including the cutting and pasting of signatures and dates in order to give the false impression that disclosures were timely provided in accordance with State or Federal law; inadequate closing documents, including initial And final Truth in Lending disclosures; improper disclosure of the yield spread premium; adverse action notices; registering employees with the Department. In addition, the Staff alleged that Respondent Cook had:

> [m]isrepresented material facts in order to influence, persuade or induce a mortgagor to take a mortgage loan in violation of Section 40-58-70 (1) of the *Code of Laws of South Carolina*;
>
> [i]ntentionally misrepresented or concealed a material factor, term, or condition of a transaction to which he is a party, pertinent to a mortgagor in violation of Section 40-58-70 (2) of the *Code of Laws of South Carolina*.
>
> [f]ailed to disclose all fees earned for services rendered as a mortgage loan broker as required by RESPA and in violation of Section 40-58-75 (C) of the *Code of Laws of South Carolina.*
>
> [f]ailure to maintain at the broker's place of business the records and documents pertaining to business conducted in violation of Section 40-58-75 (A) of the *Code of Laws of South Carolina* and *S. C. Code Regs*. 28-400; and
>
> [e]ngaged in a transaction, practice or course of business which is unconscionable in light of the regular practices of a mortgage loan broker, or which operates as a fraud upon a person in connection with the making of or purchase or sale of a mortgage loan in violation of Section 40-58-70 (3) of the *Code of Laws of South Carolina*.

While Respondents made no specific admission other than that AMC had failed to comply with the Mortgage Loan Broker Act. It agreed, through Respondent Cook, however, to henceforth

make timely disclosures, maintain records, give reasonable access to its records to Staff, to not engage in a transaction, practice or course of business which is unconscionable such as copying a consumer's signature onto any preliminary disclosure documents or to have the consumer sign documents in blank, as well as to pay a fine in the amount of seven hundred and fifty ($750.00). As with other Assurances, the Assurance indicated that if its terms were not followed, it could be used as evidence in an administrative hearing (Exhibit 10).

11.) Leon and Francis Johnson went to AMC to acquire a loan to pay for a home to be built in the Hastings Point subdivision. They became aware of AMC though the real estate agent Anderson. They went to AMC at its location on Wilson Boulevard. No broker agreement was ever signed until the closing of the loan, nor indeed does it appear that the Johnsons' signatures are on any disclosure forms prior to the closing of the loan on June 30, 2000. (Testimony of Leon Johnson).

12.) The Johnsons paid four hundred ($400.00) dollars in earnest money to Russell Jeffcoat to reserve the lot in Hastings Point until they could buy it, on or about February 14, 2000 (Exhibit 19). At about that time, an addendum was drawn up to extend the potential closing date to May 15, 2000 (Exhibit 20). Apparently that closing date expired. Closing was finally set for June 30, 2000, and as Mr. Johnson testified, Respondent Cook was not present at closing. It is the series of events that appear to have happened immediately before and during the day of the closing that are most curious and troubling. A dual agency contract, dated 6/28/00 by Respondent Cook James Anderson of Russell Jeffcoat and dated 6/29/00, signed by a Howard with a last name illegible for Hastings Point, agreeing to allow Russell and Jeffcoat to act as a dual agent for the sale of Lot 3, Hastings Point (the lot the Johnsons sought to buy) to Paramount

Communications, a company owned by Respondent Cook (Exhibit 18). Exhibit 16 is a HUD settlement statement, showing that Hastings Point Development Corp., L.L.C. sold the lot to Paramount Communications. The statement is dated June 30, 2000. It should be noted, however, there is no indication there was a loan or other financing associated with this transaction as is typically the case with HUD statements, and the space indicated on the HUD statement for the name and address of the lender is left blank. The price the lot sold for was $36,000.00, but indicated there was a deposit of earnest money of $500.00. It was signed by Respondent Cook and a Charles Gary for Hastings Point (Testimony of Leon Johnson; Exhibit 16). The Court House record of the recording of the deed to Paramount was recorded 6/30/00 (Exhibit 24). Another HUD statement was acquired by Mr. Johnson from the Twins, Inc. indicating the refinance loan made by Twins would pay Paramount $69,000.00 for the same lot, Lot 3 in Hastings Point in order that it might be sold to the Johnsons, a lot that had been sold to Paramount the same day for $36,000.00 (Exhibit 17). Recording of the deed to the Johnsons occurred according to Court Records on 6/31/01, a non-existent day on the calendar. This is perhaps a clerical error or a unique feature of the Court's recording system. Nevertheless, it is noteworthy that it was recorded on the second page on the deed book after the deed to Paramount, indicating that not much time elapse between the entries, whatever day they were actually recorded (Exhibit 24). The deed itself was dated the 30th day of June, 2000 (Exhibit 22).

11.) Mr. Johnson requested and received records from closing attorney concerning the closing. Attorney Mann wrote a check dated June 30, 2000 to himself, ostensibly to pay out of escrow the adjusted total due on the lot of $35,910.00 (Exhibit 21). I note that this corresponds exactly with the "Cash from borrower" item on line 303 of Exhibit 16, the sale of the

lot to Paramount from Hastings Point. He cut a check in the amount of $32,659.70 to Respondent Roy Cook. The total of these two checks ($68,569.70) corresponds *within the dollar* to the total amount of cash "to seller" on line 603 of Exhibit 17, the HUD Statement of the sale of the lot to the Johnsons from Paramount. It may correspond exactly, since the copy on Exhibit 17 has the digits for cents cut off. The conclusion is inescapable that in arranging the loan for *his* clients the Johnsons, Respondent Cook insinuated himself into the sale of the lot in order buy the lot in the name of his own company and resell the lot to the Johnsons at a staggering markup. Mr. Johnson testified, and I find credible, that Respondent Cook used the Johnsons' own money from the draw from the Christy Company of that same day (Exhibit 23, item 1 dated 6/30/00 in the amount of $76,312.00) to finance both the bona fide sale price of approximately $36,000.00 *and* the markup.

Respondent Cook, in his direct testimony, and in allusions made in cross examining Mr. Johnson, did not deny the purchase of the lot, nor even Mr. Johnson's theory of how he got the money. Instead, he indicated that the transaction was done this way because of cost overruns, that Mr. Johnson somehow could not have started construction on his own, and that Respondent Cook had used the money or some portion of it to pay for materials and the start of construction, and that Mr. Johnson knew all about the arrangement anyway. He also alluded in cross examination to the notion that all businesses are in business to make a profit, buying wholesale and selling retail, and the like. I do not find this construction to be credible. First, Respondent Cook produced no receipts or other evidence that any of the money he received from the proceeds of the sale were put toward construction expenses. In addition, since the construction loan was in Mr. Johnson's name, no credible reason was given as to why Mr.

Johnson could not pay construction expenses directly rather than through a third party's purchase of his lot. Moreover, with regard to the notion that Mr. Johnson knew all about the arrangement beforehand, clearly the sale to Paramount happened that very day. Respondent Cook did not dispute that he was not even at the closing to know what the Johnsons might have known. Any reasonable person knowing prior to closing that an additional $30,000 plus thousand in debt was being added to the loan would have required answers to a number of questions regardless of how altruistic Respondent Cook's purchase of the lot was claimed to be. I also find credible Mr. Johnson's outright denial that he knew about the resale before closing, and that he did not know about the sale until he examined the paperwork after closing and his suspicions were aroused.

12.) I find that disclosure of various documents, including but not necessarily limited to the disclosures of Exhibit 25, the Attorney/Insurance Agent preference and the broker agreement, were not given to the Johnsons before the closing of the loan on June 30, 2000. Indeed, it is the Johnsons' testimony that a number of these disclosures were not given to them at closing but they in fact had to request them afterward (Testimony of Leon and Frances Johnson).

13.) Respondent Cook is a first cousin to Frances Johnson (Testimony of Frances Johnson).

CONCLUSIONS OF LAW

1.) I have jurisdiction to hear this matter pursuant to the Mortgage Loan Broker Act, *S. C. Code Ann*. §§ 40-58-10 through-110 (Supp. 2001) and the Administrative Procedures Act, *S. C. Code Ann*. §§ 1-23-310 *et seq*. (Supp. 2001).

2.) Service of process on Respondents was timely and proper pursuant to the Administrative Procedures Act.

3.) Respondent AMC is a corporation existing under the laws of South Carolina.

4.) Patrick Cook, in his dealings with the Niblocks, was acting in the course and scope of his employment with AMC. Under South Carolina law, a principal is liable civilly for the tortious acts of his agent when the act was done within the course and scope of employment. This is true even when the agent's act is illegal. *Jamison v. Howard*, 275 S.C. 344, 271 S.E. 2d 116 (1980); *West v. Service Life & Health Ins. Co.*, 220 S.C. 198, 66 S.E.2d 816 (1951); *State ex rel. McLeod v. C.& L. Corp., Inc.*, 280 S. C. 519, 313 S. E. 2d 816 (Ct. App. 1984). This is also true when the illegal act was not specifically sanctioned by the principal, if it were otherwise undertaken in the course and scope of employment. *Fields v. Lancaster Cotton Mills,* 77 S. C. 546, 58 S. E. 608 (1907); *C.& L. Corp., supra.*

5.) Greg Floyd, in his dealings with Mr. Knox and Ms. Rasmussen, was likewise acting in the course and scope of his employment.

6.) Patrick Cook, in soliciting $1500.00 downpayment on a home and /or loan for the Niblocks (Exhibit 4), and AMC in failing or refusing to account to the Niblocks for this money, has violated the following Sections of the Mortgage Loan Broker Act:

7.) In soliciting a payoff from Mr. Knox and Ms. Rasmussen, knowing that they were landlords of Mr. Miller and not mortgagees, Greg Floyd, acting on behalf of RMC, sought a verification of false information to deceive a yet unidentified lender. This violated the following provisions of the Mortgage Loan Broker Act;

a.) *S. C. Code Ann*. § 40-58-70 (1) by misrepresenting material facts or making false promises likely to influence, persuade, or induce a person to make or to take a

mortgage loan;

b.) *S. C. Code Ann*. § 40-58-70 (2) by intentionally misrepresenting or concealing a material factor, term or condition of a transaction to which the broker is a party, pertinent to an application for a mortgage loan or a mortgagor;

c.) *S. C. Code Ann*. § 40-58-70 (3) by engaging in a transaction, practice, or course of business which is unconscionable in light of the regular practices of a mortgage loan broker, or which operates a fraud upon a person, in connection with the making of or purchase or sale of a mortgage loan.

I consider it immaterial for purposes of determining violations of the Mortgage Loan Broker Act that no lender was actually defrauded because the sellers refused to falsify the verification.

8.) By failing or refusing to make or give to the Johnsons Truth in Lending Act Disclosures, RESPA disclosures, Attorney/Insurance Agent preference disclosures and the broker agreement, Respondents RMC and Cook violated the following provisions of State and Federal Law:

a.) The federal Truth in Lending Act, 15 U.S.C.§ 1601 *et seq*., and particularly its implementing regulation, Regulation Z at 12 C. F. R. §226.19 (a)(1);

b.) The Real Estate Settlement Procedures Act, and its implementing regualtion, Regulation X, at 24 C.F.R. §3500.7;

c.) The Mortgage Loan Broker Act, *S. C. Code Ann*. § 40-58-75 (A);

d.) The Consumer Protection Code, *S. C. Code Ann*. § 37-10-102 (A); and

e.) The Assurance of Discontinuance it entered with the Department in

October 1999. I note, however, that Assurance does not appear to be accepted pursuant to Section 37-6-109, and is not in the form of an Order. Thus it does not appear that Respondents may be held accountable for its violation as a separate violation of law or order of the Administrator, but it is noteworthy as evidence of similar violations in the past.

I note further that these violations exist even if I take Respondent Cook's testimony at face value and accept the notion that aall dislosures were made at closing. With the exception of final Truth in Lending dislosures, all the other dislosures are untimely as a matter of law if not made prior to closing.

9.) By surreptitiously purchasing the Johnsons' lot and reselling it to them at a thirty three thousand ($33,000.00) mark up, Respondents AMC and Cook violated the following provisions of the Mortgage Loan Broker Act:

a.) *S. C. Code Ann*. § 40-58-70 (1) by misrepresenting material facts or making false promises likely to influence, persuade, or induce a person to make a mortgage loan;

b.) *S. C. Code Ann*. § 40-58-70 (2) by intentionally misrepresenting or concealing a material factor, term or condition of a transaction to which the broker is a party, pertinent to an application for a mortgage loan or a mortgagor;

c.) *S. C. Code Ann*. § 40-58-70 (3) by engaging in a transaction, practice, or course of business which is unconscionable in light of the regular practices of a mortgage loan broker, or which operates a fraud upon a person, in connection with the making of or purchase or sale of a mortgage loan.

More fundamental than any violation of the Mortgage Loan Broker Act, however, the Respondents have violated principles of good faith and fair dealing in commerce that the law

writes into every contract. *See, e.g., S. C. Code Ann*. § 36-1-102 (3). In my opinion, they have also violated a fiduciary duty owed to the Johnsons.

The mortgage loan broker industry has been in a debate for years over the nature of its duties to borrowers on a state and national level. Some assert that brokers owe to borrowers a fiduciary obligation. Others argue that the relationship is arms length. There is not much law on the issue. Most cases in South Carolina construing the duties of brokers to their customers concern real estate brokers. Regarding brokers generally, they are regarded as agents.

> Although a broker is, broadly speaking, an agent, the word "agent" is a broader term than "broker," more comprehensive in its legal scope, for while every broker is in a sense an agent, not every agent is a broker.
>
> 12 Am. Jur. 2d *Brokers* § 3 (notes omitted) (1997)

Also, brokers can be regarded as fiduciaries.

> A broker, like an agent, is a fiduciary who holds a position of trust and confidence. A broker's fiduciary duties to his or her principal include the obligation to:
>
> > (1) account for all funds rightfully belonging to the principal.
> > (2) refrain from acting adversely to the principal's interests
> > (3) avoid engaging in fraudulent conduct; and
> > (4) communicate information he or she may possess or acquire which is or may be to the principal's advantage.
> >
> > *Id*. at § 109 (notes omitted)

In South Carolina one is considered an agent when one is appointed by a principal as his representative, and the principal either confides management of some business to be transacted in the principal's name or on his account and who brings about or effects legal relationships between the principal and third parties. *Peeples v. Orkin Exterminating*, 244 S. C. 173, 135 S. E. 2d 845 (1964).

There may be a fair question in some cases whether the broker is an agent for the borrower or the funding lender. Generally speaking, the principal is the person who seeks the services of the agent and pays it fees, commissions or salaries. Typically lawyers in closing transactions may be agents for buyers, sellers and lenders, but only to the extent their interests are not in conflict and after full disclosure of the dual agency status. This file contained two instances in which real estate agents sought to act as agents for more than one party, and did so after getting the parties consent. See Exhibits 4 and 18. Brokers may get paid by lenders, but they also get paid buy borrowers who seek out their services. Clearly, AMC got paid by the Johnsons in this series of loans. *See* Exhibit 15, Good Faith Estimate line 808; Exhibit 25 Good Faith Estimate, line 808. The emerging law appears to be in accord with old agency principals: the person who hires and pays a broker is the principal to whom the broker owes a fiduciary duty. *Rauscher Pierce Refsnes, Inc. v. Great Southwest Savings, F. A., et al.* 923 S.W. 2d 112 (Tex. App. 1996). That an agent may owe duties to other persons does not diminish the duty to the principal.

Whether or not AMC sought to be or could be compensated as a broker for the Christy construction loan, it is clear that AMC considered itself a broker working on behalf of the Johnsons throughout. Exhibit 26 shows that AMC pulled Mr. Johnson's credit no less than five times, three times prior to the June 30, 2000 closing. On the subsequent permanent loans, AMC was well paid, as noted above. Exhibit 27 shows that two days before the June 30, 2000 closing, Daryl Scott of AMC sought and received a verification of employment on Mr. Johnson. Far from being merely an astute entrepreneur finding an opportunity to make a profit, as Respondent Cook alleges, Respondent Cook and AMC were agents of the Johnsons and Respondents' very

knowledge of the lot's availability came because the Johnsons sought their help in obtaining financing. In such a situation, Respondent Cook chose to self deal to his clients' disadvantage. Each remaining loan was made significantly more expensive as a result. South Carolina case law is fairly clear on such transactions: the agent's fee or commission is forfeit. *Pollitzer v. Long*, 295 S.C. 28, 367 S. E. 2d 18 (1988); *Hallman v. Lipscomb*, 114 S. C. 171, 103 S. E. 513 (1920). Indeed, such a breach of an agent's duty is regarded as constructive fraud. *Designer Showrooms, Inc. v. Kelley*, 304 S. C. 478, 405 S. E. 2d 417 (Ct. App. 1991). I need not address other questions regarding a broker's duty to their clients. Suffice it to say, when a broker uses his position as a broker to make profit from the transaction not bargained for with the borrower, he violates a fundamental fiduciary duty to the borrower, and brings into question his fitness to continue in the business.

10.) Finally, I address the issue of the response to the Supplemental Form A questions about past crimes. Respondent Cook's explanation, that he answered "no" in view of his understanding of the look back period of the Act an on publications of the Department stating the length of the look back period. I have heard similar pleas from brokers or broker employees to the effect they read the question to mean "crimes in this business" and the like. Nothing detracts from the literal import of the question actually asked; "Have you *ever* been convicted of a felony? (emphasis added) " It is probably true that the crimes Respondent Cook were convicted of were past the look back period. Respondent Cook insists that he is being unfairly targeted for mistakes which happened in the remote past. He misses the point. The Department could not have denied his license based on the prior remote convictions alone. Staff's position, however, is that Respondent Cook's answer violated Section 40-58-55 (2), withholding material information

in connection with an application. Staff, of course, must make an overall assessment of any applicant as to business activities, financial responsibility, character and fitness [Section 40-58-50(B)] that is broader in scope than a mere concern with the look back period. As previously stated, brokers and employees who fail to truthfully answer Supplemental Form A questions according to the literal import do far more injury to their long term prospects to work in the mortgage loan broker industry than those who truthfully report crimes, even serious financial related crimes, that are remote in time by more than ten years. It appears that Respondent technically violated Section 40-58-55 (2). Even so, this section only comes into play on application or renewal. Although renewal is approaching, the relief set forth below in effect moots this finding.

11.) I find that the Respondents have engaged in the above violations intentionally and repeatedly, in a manner that suggests widespread noncompliance with the disclosure requirements of State and Federal law.

THEREFORE IT IS ORDERED that Respondents immediately cease and desist violating the Mortgage Loan Broker Act, S. C. Code Ann. § 40-58-10 through -110, and the additional State and Federal statutes and regulations herein set forth;

IT IS FURTHER ORDERED that the mortgage loan broker license held by Respondents AMC and Cook are hereby revoked;

IT IS FURTHER ORDERED that the Staff commence a proceeding to access the bond of AMC for purposes of reimbursing injured consumers. It is not clear the total extent borrowers may have been injured by AMC's violations, but it is clear that the Niblocks are owed $1500.00 and the Johnsons are owed $18,737.50 in directly and indirectly assessed broker fees

that were wrongly retained by AMC.

AND IT IS SO ORDERED.

_____
Philip S. Porter
Administrator

Columbia, S. C.

_____, 2002